No. 87-1379

In the Supreme Court of the United States

OCTOBER TERM, 1987

UNITED STATES DEPARTMENT OF JUSTICE, ET AL., PETITIONERS

v.

REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE PETITIONERS

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QUESTIONS PRESENTED

1. Whether, in applying the invasion-of-privacy exemptions of the Freedom of Information Act (FOIA), 5 U.S.C. (& Supp. IV) 552(b)(6) and (7)(C), to a request for an individual's criminal (or other) records that are compiled by the federal government in large national data banks, a district court may conclude that the individual has a substantial privacy interest in the compiled information even though the same raw data may be "matters of public record" in local government offices.

2. Whether, in applying Exemptions 6 and 7(C), a court should make an assessment of the weight of the "public interest" in the disclosure of the particular information sought, or should instead weigh in the balance only a uniform "public interest" in the disclosure of all information in the possession of the government.

PARTIES TO THE PROCEEDING

The petitioners are the United States Department of Justice, the Federal Bureau of Investigation (FBI), Attorney General Edwin Meese III, and FBI Director William S. Sessions.

The respondents are The Reporters Committee for Freedom of the Press and Robert Schakne, a CBS News correspondent.

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BRIEF FOR THE PETITIONERS

OPINIONS BELOW

The initial opinion of the court of appeals panel (Pet. App. 1a-34a) is reported at 816 F.2d 730. The majority and dissenting opinions of the court of appeals panel on denial of rehearing (Pet. App. 35a-49a) are reported at 831 F.2d 1124. The order denying rehearing en banc and the statement of four judges dissenting from that order (Pet. App. 64a-66a) are unreported. The memorandum of the district court (Pet. App. 52a-58a) is unreported.

JURISDICTION

The judgment of the court of appeals (Pet. App. 60a-61a) was entered on April 10, 1987. A petition for rehearing was denied on October 23, 1987 (Pet. App. 62a-63a). On January 14, 1988, Chief Justice Rehnquist

extended the time for filing a petition for a writ of certiorari to and including February 20, 1988. The petition was filed on February 16, 1988, and was granted on April 18, 1988. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

The Freedom of Information Act, 5 U.S.C. (& Supp. IV) 552, provides in pertinent part:

(a) Each agency shall make available to the public information as follows:

* * * * *

(3) * * * each agency, upon any request for records which (A) reasonably describes such records and (B) is made in accordance with published rules stating the time, place, fees (if any), and procedures to be followed, shall make the records promptly available to any person.

(4) * * *

(B) On complaint, the district court * * * has jurisdiction to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant. In such a case the court shall determine the matter de novo, and may examine the contents of such agency records in camera to determine whether such records or any part thereof shall be withheld under any of the exemptions set forth in subsection (b) of this section, and the burden is on the agency to sustain its action.

* * * * *

(b) This section does not apply to matters that are—

* * * * *

(6) personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy; [or]

(7) records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information * * * (C) could reasonably be expected to constitute an unwarranted invasion of personal privacy * * *.

STATEMENT

This case arises from two 1978 requests under the Freedom of Information Act (FOIA), 5 U.S.C. (& Supp. IV) 552. CBS News reporter Robert Schakne and The Reporters Committee for Freedom of the Press filed requests with the Department of Justice for information on the criminal records of William, Phillip, Charles, and Samuel Medico. The requests sought "information about any prison sentences served in federal prisons, any convictions in federal courts, any indictments by federal grand juries or any arrests by federal law enforcement authorities," as well as "information known to the Department of Justice" concerning similar state and local matters (J.A. 38; see also J.A. 53-54).

1. The principal source of such criminal history information would be the files of the FBI's Identification Division. Pursuant to the statutory authority of 28 U.S.C. 534, the Identification Division was established in 1924 to serve as a national clearinghouse of identification records for law enforcement purposes (J.A. 61). The Division catalogs fingerprint cards submitted by criminal justice agencies in conjunction with arrests and incarcerations, as well as fingerprints submitted for other purposes (J.A. 62). For

each individual for whom criminal justice information is submitted, the Division compiles an identification record, or "rap sheet" (J.A. 63). The FBI maintains such rap sheets on more than 24 million persons.

Rap sheets reflect information regarding arrests, convictions and other dispositions when known, and incarcerations (J.A. 63). The criminal information that makes up the rap sheet is supplied voluntarily by a variety of federal, state, and local agencies; the Division itself does not originate any such data (*ibid.*). In many (though not all) instances, the contributing agency is a state law enforcement agency that itself compiles criminal history information from local originating sources—*e.g.*, local police departments and county court systems. If an agency that submits an arrest record later provides the FBI with dispositional information (*e.g.*, conviction, dismissal), that information is included on the rap sheet. In many instances, however, such information is never received, and the rap sheet will continue to reflect only the arrest. The Division removes entries from a rap sheet when a contributing agency asks it to do so, but an arrest or conviction record that has been expunged at the state and local levels may continue to appear on the rap sheet unless the FBI is advised that the record should be updated. Apart from the Identification Division's rap sheet files, other FBI and Justice Department files may also contain similar criminal history information collected in the course of federal criminal investigations (see J.A. 86-88).

The paramount purpose for which rap sheets are maintained is to assist law enforcement officials in the detection and prosecution of crimes and to furnish information to the courts and corrections officials for use in making decisions regarding sentencing, parole, and similar matters (J.A. 63). Because the Department of Justice recognizes

the adverse effects that dissemination of criminal history information may have on the subjects, the Department has adopted policies to limit the dissemination of such information (see 28 C.F.R. 20.30-20.38; see also 28 C.F.R. 50.2). Apart from dissemination for law enforcement purposes and dissemination to other federal agencies for internal use, rap sheet information is released only to certain recipients specifically authorized by federal statute to obtain such information for employment and licensing purposes, including state and local governments, certain banking institutions, and institutions in the securities and commodities trading industries (J.A. 64-65). Those recipients, however, cannot receive rap sheet information on the basis of a "name check" of the subject, but only on submission of positive identification, in the form of a fingerprint card (J.A. 65). Moreover, in releasing rap sheet information to banks or state or local government entities, the FBI deletes entries of arrests more than one year old if no disposition is shown (J.A. 66; 28 C.F.R. 20.33(a)(3)). In addition to these policies regarding criminal history files as such, more general Justice Department regulations, which are intended to "strik[e] a fair balance between the protection of individuals * * * and public understandings of the problems of controlling crime and administering government," generally preclude the release of a criminal defendant's prior record (28 C.F.R. 50.2(a)(2) and (b)(4)).[1]

---

[1] These policies were premised, in part, on the belief that rap sheets were wholly exempt from FOIA disclosure, pursuant to 28 U.S.C. 534 and Exemption 3 of FOIA, 5 U.S.C. 552(b)(3). The court below rejected our Exemption 3 argument, and we did not seek review of that holding in this Court. It must thus be assumed, for present purposes, that these policies yield to FOIA's general disclosure mandate to the extent that FOIA Exemptions 6 and 7(C) do not support nondisclosure.

2. The Justice Department denied respondents' requests on two grounds: (1) that under 28 U.S.C. 534 and FOIA Exemption 3, 5 U.S.C. 552(b)(3), all rap sheet information is exempt from disclosure; and (2) that under FOIA Exemptions 6 and 7(C), 5 U.S.C. (& Supp. IV) 552(b)(6) and (7)(C), disclosure of the information sought, whether contained in rap sheets or not, would constitute an unwarranted (indeed, "clearly unwarranted") invasion of the subjects' privacy (J.A. 48-50, 59-60).

Respondents filed the present action in December 1979. The complaint, unlike the actual FOIA requests that preceded it, declared that "[t]he information sought is limited to matters of public record" (J.A. 33). The scope of the controversy was further narrowed in two respects during the course of the district court proceedings. First, the Department released information regarding all of the subjects except Charles Medico because they had died, and, in the judgment of the Department, there was therefore no longer any substantial privacy interest to be protected (J.A. 108-127). Second, with respect to the remaining subject, Charles Medico, the Department disclosed that it had not withheld any non-rap-sheet records of "financial" crimes.

The latter disclosure was made in an effort to avoid litigation over a nonissue—the withholding of financial crime information on unwarranted-invasion-of-privacy grounds—and in response to litigation papers in which respondents, for the first time, specified an interest in such crimes. In their summary judgment papers, respondents indicated that their inquiry was directed at uncovering evidence of illegal dealings between the Medicos and Representative Daniel Flood, who had reportedly been involved in arranging for federal contracts for a business operated by the Medicos (J.A. 96-97). Respondents further suggested that the significance of the information sought would depend on the "type of criminal record" involved, and they cited information regarding "a record of bribery, embezzlement, or other financial crime" as information that "would potentially be a matter of great public interest" (J.A. 97). Because the Department agreed that such a record would be of public interest, the Department formally made it clear that, other than rap sheet information for which it was still claiming Exemption 3 (see note 36, *infra*), there were no records of the sort of "financial crime[s]" mentioned by plaintiffs regarding Charles Medico (J.A. 116-117). The government continued to refuse to release—or to confirm or deny the existence of—a rap sheet for Charles Medico or any other records of nonfinancial crimes (or alleged crimes) resulting in his arrest, indictment, conviction, acquittal, or sentence. Although the government had hoped that this disclosure might satisfy respondents (see J.A. 105-106 nn.3 & 4), respondents persisted in seeking *all* records of arrests (etc.) of Charles Medico, no matter what the alleged crime.

The district court granted summary judgment to the government in August 1985 (Pet. App. 52a-58a). The court first ruled that 28 U.S.C. 534 qualified as a withholding statute under FOIA Exemption 3 and barred the release of rap sheet information (Pet. App. 54a-56a). The court then held that rap sheet information, as well as any similar information that might exist in other Department files, was exempt from disclosure under FOIA Exemptions 6 and 7(C), since the release of such information would constitute an invasion of privacy that was not warranted by any public interest in disclosure (Pet. App. 56a-58a). The court based that conclusion on its own assessment of the privacy and public interest concerns implicated in the circumstances of this case. In making that

assessment, the court took into account the Department's in camera submission of any and all responsive information that had been withheld (*id.* at 57a-58a & n.2, 59a; see also J.A. 130-133).

3. The court of appeals reversed. In the initial panel opinion, the court first held that 28 U.S.C. 534 did not qualify as a withholding statute under FOIA Exemption 3 and that rap sheets cannot be withheld on that basis (Pet. App. 6a-13a). The court went on to rule that the district court had erred as a matter of law in its application of Exemptions 6. and 7(C) (*id.* at 14a-26a). The court acknowledged that those exemptions call for a balancing of the privacy interests at stake against the public interest in disclosure, but it found reversible error in the district court's method of striking that balance.

With regard to the privacy side of the balance, the court opined that the routine public availability of a record at the local level—such as a conviction record in a county courthouse or an arrest record on a local police blotter—sharply attenuates any privacy interest in such information, even when it is compiled in a large, national data bank (Pet. App. 18a-21a). The court dismissed the government's argument that individuals have a protectible interest under FOIA in maintaining the obscurity of such records, declaring the argument "attractive as a legislative policy matter" but unrelated to the statutory term "privacy" (*id.* at 18a-19a). On the public interest side, the court began by noting the "awkwardness of * * * appraising the public interest in the release of government records" (*id.* at 21a), and sought "objective indications of the public interest" (*id.* at 23a). It found such indications in the policy determinations of state and local bodies to maintain public access to the underlying records, and it held that the district court should have deferred to those

determinations in assessing the "public interest" for purposes of the FOIA balancing test (*id.* at 22a & n.13). The court remanded for further proceedings under that standard.

Judge Starr concurred in the result but expressed serious reservations about the test announced by the panel majority (Pet. App. 27a-34a). He disagreed sharply with the majority's approach to the "public interest" side of the balancing test. While sharing to a degree the majority's discomfort with the "value-laden judgment calls" required under the balancing test, Judge Starr acknowledged that such balancing is what Congress requires under these exemptions, and he chided the majority for "go[ing] AWOL" by declining to perform that task (*id.* at 30a).

4. The government sought rehearing on the Exemption 6 and 7(C) issues. Our rehearing petition was supported by an amicus curiae submission by SEARCH Group Inc., an organization of state and local law enforcement officials, as well as agencies of the States of New York and California. Those amici sought, among other things, to bring to the court of appeals' attention the complexity of state and local provisions regarding the disclosure of arrest and conviction records. In particular, amici noted that most States—which often are the direct source of data provided to the FBI for inclusion in rap sheets—treat compilations of such data as confidential at the state level even though the underlying information remains a "public record" locally. See, *e.g.*, N.Y. Exec. Law § 837 (McKinney 1982); Cal. Penal Code § 11077 (West 1982). Amici further noted that the panel opinion could have extremely adverse consequences for the sharing of information by law enforcement agencies, by inducing some States to decline to provide information to the FBI in order to prevent state-compiled information from becoming widely available by means of FOIA requests.

The court of appeals denied rehearing. The panel majority, however, altered its rationale, and Judge Starr voted to grant rehearing and affirm the district court's grant of summary judgment to the government (Pet. App. 35a-49a). The majority analyzed anew the public interest side of the balancing test, abandoning its earlier reliance on state and local policy determinations as guides for the assessment of the public interest in disclosure, but declining to articulate any alternative means of making such assessments (*id.* at 36a-40a). On the contrary, the panel indicated its view that the judiciary "cannot" in any principled way make such assessments with respect to particular government records (*id.* at 38a). The panel therefore held that the only "public interest" to be considered in Exemption 6 and 7(C) cases is the general disclosure policy inherent in FOIA, without any distinction based on the nature of the information sought. The panel held that the court must "balance" that static interest against any privacy interests cognizable in particular instances (*id.* at 40a).

With respect to the privacy side of the balancing test, the panel majority adhered to its view that there can be little if any privacy interest in information that is a matter of "public record" at any level (Pet. App. 40a-42a). It clarified its prior opinion, however, by stating that the relevant inquiry is a "factual" one and not a matter of deference to state and local policy determinations (*id.* at 41a-42a).

Judge Starr, in dissent, "confess[ed] that [he] was wrong the first time around" (Pet. App. 48a) and now vigorously disputed the panel's Exemption 7(C) analysis in its entirety. Judge Starr reiterated that the majority "fail[ed] to carry out its obligation" under the statute to make an evaluation of the public interest in disclosure of particular

information (*id.* at 44a). In response to the majority's suggestion that it is impossible for judges to assess the public interest in particular information, he pointed out that such distinctions are drawn in other areas of the law (such as defamation of public figures), which might provide useful analogies for undertaking this task (*id.* at 45a-46a).

Judge Starr also emphasized the distinct privacy concerns presented by "computerized data banks of the sort involved here," noting that both Congress and a "host" of States have recognized those concerns (Pet. App. 44a). He stated that the panel's ruling would "have a pernicious effect on personal privacy interests in conflict with Congress' express will," citing other types of federal data compilations containing information that is "highly personal" yet may be a "public record" at some level (*id.* at 48a-49a). He further noted the potentially "crippling" administrative burdens the panel's ruling could impose, both by requiring federal agencies to ascertain the "public record" status of information received from outside sources and by transforming the federal government "in one fell swoop into *the* clearinghouse for highly personal information" of various sorts (*id.* at 46a-48a). Judge Starr said, "We should abandon right now our unfortunate departure from traditional FOIA analysis; having repented, we should then conduct an old-fashioned Exemption 7(C) balancing" (*id.* at 49a). Conducting that balancing, Judge Starr concluded that he would affirm the district court's determination that the privacy interests in this case outweighed the "limited public interest" in disclosure (*ibid.*).

Several weeks later, the court of appeals denied the government's suggestion of rehearing en banc (Pet. App. 64a-66a). Four dissenting judges characterized the panel's decision as "profoundly wrong," stating that "[o]pening

up the vast storehouse of computerized criminal histories to FOIA requests, regardless of how remote and negligible the public interest in such sensitive documents may be, is unfortunate and misconceived" (*id.* at 66a).

INTRODUCTION AND SUMMARY OF ARGUMENT

Congress has provided a broad right of public access to government records through FOIA, but it has consistently taken care "to protect certain equally important rights of privacy." S. Rep. 813, 89th Cong., 1st Sess. 3 (1965), *reprinted in* Subcomm. on Administrative Practice and Procedure, Senate Comm. on the Judiciary, 93d Cong., 2d Sess., *Freedom of Information Act Source Book: Legislative Materials, Cases, Articles* 38 (1974) [hereinafter *FOIA Source Book*]. To do so, it has enacted two exemptions to FOIA's coverage. Exemption 6 (5 U.S.C. 552(b)(6)), broadly applicable to files relating to individuals, exempts material "the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." Exemption 7(C) (5 U.S.C. (Supp. IV) 552(b)(7)(C)), applicable to "records or information compiled for law enforcement purposes," provides somewhat broader protection, exempting materials the disclosure of which "could reasonably be expected to constitute an unwarranted invasion of personal privacy."[2]

Under either of those exemptions,[3] it is undisputed that the word "unwarranted" calls for "the balancing of private

[2] The quoted language is from Exemption 7(C) as amended by the Freedom of Information Reform Act of 1986, Pub. L. No. 99-570, Subtit. N, § 1802(a), 100 Stat. 3207-48. As the court of appeals acknowledged (Pet. App. 14a), Section 1804(a) of that Act, 100 Stat. 3207-50, expressly made those amendments applicable to pending cases, such as the present one (see 5 U.S.C. (Supp. IV) 552 note).

[3] As the district court and Judge Starr determined (Pet. App. 28a, 56a), and as the court of appeals majority assumed (*id.* at 14a-15a),

against public interests." *United States Dep't of State* v. *Washington Post Co.*, 456 U.S. 595, 599 (1982); see *Department of the Air Force* v. *Rose*, 425 U.S. 352, 373 (1976); S. Rep. 813, *supra*, at 9, *FOIA Source Book* 44. Nor can there by any doubt that Congress wanted the judiciary to perform that balancing task, reviewing such agency determinations de novo (5 U.S.C. 552(a)(4)(B)).

The court of appeals sought to *avoid* the balancing of interests mandated by Congress by announcing unprecedented new approaches that transform both sides of the balancing test into mechanical rules that avoid any genuine weighing of interests. The court of appeals' analysis flouts the intent of Congress that courts engage in meaningful balancing, and it demeans the legitimate privacy interests of millions of persons.

1. The court of appeals adopted an improperly restrictive and mechanistic approach to the "privacy" side of the

the present case is governed by Exemption 7(C). Congress amended the Exemption 7 threshold requirements in 1986 to encompass broadly all "records or information compiled for law enforcement purposes." Congress's avowed purpose was to eliminate any "formalistic test" regarding "investigatory records" (132 Cong. Rec. S14039 (daily ed. Sept. 27, 1986) (remarks of Sen. Hatch)). There can be no doubt that any records responsive to respondents' requests would be "compiled for law enforcement purposes." In this brief, we nevertheless treat Exemptions 6 and 7(C) together for the most part, both because the court of appeals made clear that its novel analysis was to be applied under both provisions and because the analysis under the two provisions, despite their distinct standards (see *FBI* v. *Abramson*, 456 U.S. 615, 629-630 n.13 (1982)), is analogous in its general approach. As noted below, however, the applicability of Exemption 7(C) here makes certain aspects of the court of appeals' decision – which would impose enormous burdens on law enforcement agencies – particularly troubling.

balancing test. The court of appeals purported to rely on the "plain language" of the term "personal privacy" as a reason for ignoring the individual's interest in maintaining the obscurity of "public" but widely dispersed records, but the statutory phrase encompasses that interest. The very essence of "privacy" is the individual's ability to control the dissemination of information about him. In both common parlance and legal thinking the term "privacy" has a much broader plain meaning than the court of appeals gave it.

The legislative background of FOIA indicates that Congress itself took a broad view of the concept of privacy, and specifically that it understood that "privacy" encompasses the concerns that are raised by government compilations of dispersed personal data. The history of the original FOIA, which included Exemption 6, reflects Congress's determination to afford an open-ended exemption to protect privacy interests, which Congress regarded as important. And although the actual legislative history of the 1974 amendments that added Exemption 7(C) is sparse, the subject of an individual's "privacy" interest in the obscurity of records had been the focus of substantial attention in the early 1970s by law enforcement officials, the courts, and congressional committees.

The court of appeals' analysis improperly turns the assessment of "privacy" interests under Exemptions 6 and 7(C) into a virtual per se rule requiring disclosure of records that are theoretically available to the public anywhere in the nation, contrary to the admonitions of Congress and this Court that the courts should engage in a meaningful, pragmatic balancing of interests. That lesson is particularly clear from this Court's decision in *United States Dep't of State* v. *Washington Post Co.*, *supra*, in which the Court rejected another mechanical, per se rule

and also specifically addressed the issue of "public records," noting that "the fact that [information] is a matter of public record somewhere in the Nation cannot be decisive" (456 U.S. at 603 n.5).

The assessment of the privacy interest with respect to a particular criminal history record, whether or not it is "public" somewhere, is a matter of judgment and common sense. A starting point for this assessment should be the well-recognized adverse effects that the dissemination of criminal history records, particularly arrest records unaccompanied by information as to disposition, has on the individual subject. Other factors, such as the age and location of the record and the character of the offense charged, also affect the weight to be given to the subject's privacy interest.

In addition to the errors noted above, the court of appeals erred by making its entire privacy analysis turn on a factual question—whether the underlying information is a "public record" at the local level—whose answer is often not known to the FBI when it receives a FOIA request. In cases of uncertainty about a record's "public" status at the local level, the court of appeals read into FOIA a requirement that the FBI make specific inquiries of the local agency at the time of the request. No statute gave the court authority to impose that burdensome requirement, nor is it an appropriate requirement.

2. The court of appeals made an even more radical departure from settled law with respect to the "public interest" side of the balancing test. Asserting that there is no principled way in which a court may assess the public interest in the release of particular information, the court held that it would consider, on this side of the balance, a static "public interest," based on the disclosure policies of FOIA, in the release of *any* information, without any distinction based on the nature of the information sought.

That approach is fundamentally at odds with the balancing test required by Congress. It would lead to irrational results by precluding the courts from making any distinctions whatever between information concerning matters of vital public concern and information concerning "one's otherwise inconspicuously anonymous next-door neighbor" (Pet. App. 45a (Starr, J., dissenting)). The judiciary can and does draw such distinctions in other areas of law, including other aspects of FOIA itself.

There is no reason why a genuine assessment of the "public interest" need be the standardless, "idiosyncratic" inquiry that the court of appeals feared. The policies of FOIA itself suggest a structure for this analysis, under which the weight of the "public interest" depends on the extent to which release of the information in question would advance FOIA's core purposes – *i.e.*, "ensur[ing] an informed citizenry, vital to the functioning of a democratic society." *NLRB* v. *Robbins Tire & Rubber Co.*, 437 U.S. 214, 242 (1978).

3. The district court properly balanced the privacy interest and the public interest in this case. The connection between Charles Medico and a former public official might give rise to a significant public interest in certain types of criminal records if they existed, but it does not give rise to a significant public interest in all such records regardless of their characteristics, nor does it make Mr. Medico's substantial privacy interest unworthy of consideration. The district court and the dissenting member of the court of appeals panel examined the Department's in camera submissions (which included any actual records) and agreed with the government that the privacy interests involved outweighed any public interest in disclosure that exists on the facts of this case. We submit that this conclusion, reached by the only judges who were willing to make

the correct inquiry, was plainly right and that this Court should direct the court of appeals to affirm the district court's judgment.

ARGUMENT

1. EXEMPTIONS 6 AND 7(C) REQUIRE A REALISTIC PRACTICAL ASSESSMENT OF PRIVACY INTERESTS, INCLUDING PRIVACY INTERESTS IN "PUBLIC RECORDS"

The first major error in the court of appeals' analysis was its restrictive and mechanical approach to the assessment of the subject's "privacy" interest in FBI rap sheets. The court's reasoning, which in this respect is closely tracked in the arguments of respondents (see Br. in Opp. 6-8), was that matters such as records of arrests and convictions, if "publicly" available at any level, are inherently so devoid of a "private" nature that they are necessarily beyond the scope of Congress's concern in enacting the FOIA privacy exemptions (Pet. App. 17a-18a). While stopping just short of a per se rule that there is *no* privacy interest in any "public record" the court virtually assured that result in most cases by concluding that "any privacy interest" in such records "seems insignificant" (*id.* at 20a). As noted by the dissenting judge below, such a rule would have a broad "pernicious effect on personal privacy interests," opening up a wide array of personal data to virtually automatic disclosure[4] and transforming the federal

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[4] As Judge Starr pointed out (Pet. App. 48a), relying on statements in our petition for rehearing, numerous federal agencies amass information on individuals from widely dispersed "public record" sources:

> Veterans Administration and Social Security records include birth certificates, marriage licenses, and divorce decrees (which may recite findings of fault); the Department of Housing and Ur-

government "in one fell swoop into *the* clearinghouse for highly personal information" (*id.* at 48a).

The court of appeals' holdings regarding the privacy side of the balance fail in several respects to carry out the expressed intent of Congress that "personal privacy" be protected from unwarranted invasions. First, the court's restrictive view of the term "privacy" ignores the breadth and complexity of that concept as it has been understood by Congress, the courts, and legal commentators, as well as the practical differences between information contained in dispersed, obscure local records and information contained in a centralized national data bank accessible by individual names. Second, the court's talismanic reliance on the "public record" status of information at any local level is at odds with this Court's repeated warnings that FOIA privacy determinations must be based on the careful, practical assessment of interests in particular cases, rather than mechanical rules. Finally, by shifting the analysis from a practical assessment of the overall consequences of disclosure to a single fact that is often not known to the FBI, the court of appeals' ruling fails to provide a workable standard for agency action and imposes burdens beyond those contemplated by FOIA.

A. The Statutory Term "Personal Privacy" Encompasses A Broad Range Of Privacy Concerns, Including The Dissemination Of Obscure But "Public" Records

The critical statutory language, used in both Exemption 6 and Exemption 7(C), is the simple term "personal privacy." The court of appeals observed that "[w]hat is encompassed by the 'personal privacy' language of FOIA is, of course, a question of legislative intent, but there is no

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ban Development maintains data on millions of home mortgages that are presumably "public records" at county clerks' offices.

suggestion in the legislative history of Exemption 7(C) that 'privacy' has other than its ordinary meaning" (Pet. App. 16a-17a). It was the court of appeals, however, that failed to give the term "privacy" its ordinary meaning, using instead an approach that is far more restrictive than ordinary usage and that fails to address the range of "privacy" considerations on which Congress itself has focused.

1. A pivotal issue that divides the parties, and that divided the court below, is whether the term "privacy" encompasses the interest a person has in restricting dissemination of information about himself that, although theoretically "public" in the sense that it is available to one who knows exactly where to look, is in fact little known and difficult to locate. The difference between such information, and information that is "public" in the sense of being common knowledge, could hardly be starker than in the situation at hand. The FBI's rap sheet files collect millions of items of information, from thousands of sources, and make them readily accessible by the subject's name (among other means). If those files did not exist, or were inaccessible, the only way of obtaining information of the sort respondents have sought would be to search through thousands of county courthouses and local police blotters, many of which are not even alphabetically indexed. From the point of view of the individual who is the subject of a rap sheet—the individual whose "privacy" the statute protects—the practical difference between public access to dispersed raw data and public access to the FBI's centralized files is enormous.

The court of appeals did not deny this. Yet it found the legislative phrase "unwarranted invasion of personal privacy" too narrow to afford any significant protection to this genuine interest. See Pet. App. 19a. Contrary to that

cramped view, however, one of the most fundamental aspects of the term "privacy," both in general use and as understood by Congress, involves control over obscure information.

In common parlance, "privacy" is not limited to those matters concerning an individual that are officially confidential. The term "privacy" is defined as "the quality or state of being apart from the company or observation of others." *Webster's Third New International Dictionary* 1804 (1981). Thus, contrary to the "plain language" argument advanced by the court of appeals (Pet. App. 16a-18a), neither the statute itself nor the Senate report's reference to "private affairs" supports the notion that all privacy interest is sapped out of a piece of information if there is any local government or agency that does not treat it as confidential.

In legal terminology, "privacy" has been applied to a wide range of interests protected by tort law and the Constitution. See generally W.P. Keeton, *Prosser and Keeton on The Law of Torts* 849-869 (5th ed. 1984); *Carey* v. *Population Services International*, 431 U.S. 678, 688-689 (1977). In searching for a unifying definition of all that is encompassed by the concept of privacy, commentators have repeatedly emphasized the control over information concerning the individual:

> Privacy is the claim of individuals * * * to determine for themselves when, how, and to what extent information about them is communicated to others.

A. Westin, *Privacy and Freedom* 7 (1967).

> Privacy, in my view, is the rightful claim of the individual to determine the extent to which he wishes to share of himself with others * * *. It is also the individual's right to control dissemination of information about himself * * *.

A. Breckenridge, *The Right to Privacy* 1 (1970). Perhaps the oldest and most eloquent legal definition of "privacy" is also the broadest: "the right to be let alone." W.P. Keeton, *supra*, at 849 (quoting T. Cooley, *A Treatise on the Law of Torts* 29 (2d ed. 1888)); *Olmstead* v. *United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting).

Specifically, one of the major strains of tort law in the privacy area concerns the public disclosure of information that, although true and known to some persons, is offensive to the subject when widely disseminated (see W.P Keeton, *supra,* at 856-859). The application of such law to "public records" has engendered considerable controversy, but at least some writers have opined that "merely because [a fact] can be found in a public record, [it] does not [follow] that it should receive widespread publicity if it does not involve a matter of public concern" (*id.* at 859).

The precise resolution of that question as a matter of tort law, however, is unimportant to the case at hand.[5]

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[5] The specific tort-law controversy over dissemination of public records was effectively mooted by this Court's ruling in *Cox Broadcasting Corp.* v. *Cohn,* 420 U.S. 469 (1975), in which the Court held that the First Amendment barred any legal prohibition on the truthful reporting of information obtained from public records. The rationale of *Cox Broadcasting,* however, was not—as the court of appeals seemed to think (Pet. App. 20a)—that the public availability of information somehow renders any remaining privacy interest in that information insignificant. Rather, this Court recognized that it was dealing with a "sphere of collision between claims of privacy and those of the free press," with legitimate interests to be considered on both sides (420 U.S. at 491). Moreover, with respect to the specific question of statutory construction at issue here, it is worth recalling that *Cox Broadcasting* was decided after both the initial passage of FOIA with Exemption 6, and the 1974 amendments that introduced Exemption 7(C). Particularly at the time Congress enacted Exemption 7(C), there was substantial support for the notion that publication of old conviction records could be an actionable invasion of privacy. See *Briscoe* v.

Respondents have not been barred from publishing any information in their possession, but have merely been denied an additional, more convenient source of information. Nor is there any occasion in this case for the Court to consider the scope of any constitutionally based right of privacy, which would raise far different concerns. See *Department of the Air Force* v. *Rose,* 425 US. 352, 389 (1976) (Rehnquist, J., dissenting).[6] Rather, the lesson to be drawn from the general law of privacy is simply that the term encompasses a great breadth of concerns, specifically including the dissemination of obscure information about individuals. Nothing in the language or history of FOIA indicates that Congress meant to exclude any part of the broad concept of privacy from the assessments required to be made under Exemptions 6 and 7(C).

2. On the contrary, FOIA's history shows that Congress intended Exemptions 6 and 7(C) to encompass a full range of privacy concerns, and indeed was aware of the particular privacy concerns posed by compilations of data such as criminal history records. For purposes of the present case, the relevant history includes both that of Exemption 6, enacted as an original part of FOIA, and Exemption 7(C), enacted as part of the 1974 FOIA amendments and further amended in 1986.

a. The history of Exemption 6 itself, although limited, reflects both the importance Congress attached to privacy concerns and the open-ended nature of the range of such concerns. Early drafts of FOIA had no provision com-

Reader's Digest Ass'n, 4 Cal. 3d 529, 541, 483 P.2d 34, 43, 93 Cal. Rptr. 866, 875 (1971).

[6] As Justice Rehnquist recognized there, this Court's ruling in *Paul* v. *Davis,* 424 U.S. 693 (1976), to the effect that there is generally no constitutional bar to the dissemination of arrest records, has no bearing on the FOIA issue raised where "the custodian of the records * * * has chosen *not* to disseminate the records" (425 U.S. at 389).

parable to the present Exemption 6 because it was assumed that specific statutory provisions, such as those protecting income tax returns from public disclosure, would adequately address privacy concerns. See S. Rep. 1219, 88th Cong., 2d Sess. 14 (1964), *FOIA Source Book* 86, 99.[7] In the course of hearings on the draft bill, however, Congress became aware that various federal agencies maintained "great quantities of files" on individuals the confidentiality of which was not addressed by statute (*ibid.*).[8]

Recognizing that it would be impossible to foresee all of the circumstances in which legitimate privacy concerns could be raised, Congress opted for a "general exemption" in which privacy concerns and the public interest in disclosure would be balanced on a case-by-case basis. S. Rep. 1219, *supra,* at 7, *FOIA Source Book* 92; H.R. Rep. 1497, 89th Cong., 2d Sess. 11 (1966), *FOIA Source Book* 22, 32; S. Rep. 813, *supra,* at 9 (1965), *FOIA Source Book* 36, 44; *Department of the Air Force* v. *Rose,* 425 U.S. at 373 n.10 (emphasizing the "general" nature of Exemption 6). By that approach, Congress sought to accommodate FOIA's "broad philosophy" of disclosure to "certain equally important rights of privacy with respect to

[7] This report accompanied S. 1666, 88th Cong., 1st Sess. (1963), a progenitor of FOIA passed by the Senate but not the House in the Eighty-eighth Congress. A substantially similar bill was enacted in 1966 by the Eighty-ninth Congress. See *FOIA Source Book* 8.

[8] Numerous agencies, as well as the American Bar Association, testified in the 1963 Senate hearings about the need for privacy protection. See *Freedom of Information: Hearings Before the Subcomm. on Administrative Practice and Procedure of the Senate Comm. on the Judiciary,* 88th Cong., 1st Sess. 89-91, 152, 173-174, 199-200 (1963) [hereinafter *1963 Hearings*]. Senator Bayh, in urging the Committee to include a privacy provision, referred to the protection of privacy as a matter warranting "equal attention" to that given the underlying goal of freedom of information (*id.* at 50).

certain information in Government files." S. Rep. 813, *supra,* at 3, *FOIA Source Book* 38. Specifically, Congress sought to exclude from mandatory disclosure "those kinds of files the disclosure of which might harm the individual" (H.R. Rep. 1497, *supra,* at 11, *FOIA Source Book* 32; see *United States Dep't of State* v. *Washington Post Co.,* 456 U.S. 595, 599 (1982) (emphasizing the quoted language))—a conception of "privacy" that is certainly broad enough to take account of the harm that flows when an individual's "public" but obscure arrest record is given out by the FBI.

b. In order to determine whether the statutory term "privacy" is broad enough to encompass a concern for limiting the dissemination of obscure "public" records, it is useful to see whether those who have expressed such a concern have phrased it in terms of "privacy." The years between the initial passage of FOIA in 1966 and the 1974 amendments that added Exemption 7(C) saw a remarkable amount of attention focused on the "privacy" implications of criminal history records and other accumulations of individual data by government—by commentators,[9] law enforcement organizations,[10] the courts,[11] and Congress

[9] See, *e.g.*, A. Westin, *Privacy and Freedom* (1967); A. Miller, *The Assault on Privacy: Computers, Data Banks, and Dossiers* (1971).

[10] As recounted in detail in D. Marchand, *The Politics of Privacy, Computers, and Criminal Justice Records* 55-166 (1980), law enforcement agencies devoted a great deal of attention in the late 1960s and early 1970s to the perceived need for improving criminal history record systems and for working toward automated coordination of such systems among various law enforcement agencies. The rapid progress in this area soon gave rise, however, to recognition of the possible adverse effects that such improvements could have on the individuals involved—a concern that was shared by many law enforcement officials. See, *e.g.*, *id.* at 125-131, 146-162. One of the important early efforts at delineating privacy policies for such record systems

itself. In 1971 a subcommittee of the Senate Judiciary Committee held hearings on a broad range of "privacy" concerns raised by the large quantities of data collected by federal agencies and made readily accessible by centralizaton and computerization. See *Federal Data Banks, Computers and the Bill of Rights: Hearings Before the Subcomm. on Constitutional Rights of the Senate Comm. on the Judiciary,* 92d Cong., 1st Sess. (1971) [hereinafter *1971 Hearings*]. One of the specific focuses of those hearings was the privacy concerns associated with compilations of criminal history information. See *id.* at 649-680 (testimony of Dr. Robert Gallati, Chairman of Project SEARCH Privacy Study and Director of New York State Identification and Intelligence System); *id.* at 849-860 (testimony of Richard W. Velde, Associate Administrator, LEAA). Dr. Gallati noted that "[t]he mere fact that

was a 1970 report by Project SEARCH (the precursor of amicus SEARCH Group Inc.), which recommended, among other things, strict controls to limit access to such information (see *id.* at 127-129).

[11] See *Menard* v. *Mitchell,* 430 F.2d 486 (D.C. Cir. 1970), on remand, 328 F. Supp. 718 (D.D.C. 1971), rev'd in part *sub nom. Menard* v. *Saxbe,* 498 F.2d 1017 (D.C. Cir. 1974). In the *Menard* litigation, 28 U.S.C. 534 (the statute authorizing the FBI to compile rap sheets) was interpreted—in order to avoid what were perceived as constitutional "privacy" concerns—to limit the FBI's discretion to release rap sheet information. See 430 F.2d 490-492; 328 F. Supp. at 726. That holding, and the congressional response seemingly upholding its premise, formed the basis for our argument below that Section 534 qualified as an Exemption 3 statute. See Gov't C.A. Br. 24-27. Although we do not advance the Exemption 3 argument before this Court, and we do not necessarily endorse the constitutional theories voiced in the *Menard* opinions, they reflect one understanding of "privacy" in this context, which was in fact known to Congress. See *Disseminaton of Criminal Justice Information: Hearings Before the Subcomm. on Civil Rights and Constitutional Rights of the House Comm. on the Judiciary,* 93d Cong., 2d Sess. 88, 233-281 (1974) [hereinafter *House Criminal Justice Hearings*].

[a criminal history record] system deals exclusively with public record data does not eliminate the need for attention to security and privacy protection" (*id.* at 657).

Hearings held by a subcommittee of the House Judiciary Committee in 1973 and 1974, which focused exclusively on criminal justice information, repeatedly noted concerns of privacy regarding criminal history records. *Dissemination of Criminal Justice Information: Hearings Before the Subcomm. on Civil Rights and Constitutional Rights of the House Comm. on the Judiciary,* 93d Cong., 2d Sess. 1, 76-78, 187, 211-212, 214-215 (1974).[12] In these hearings, it was expressly recognized that criminal history records consist of entries that are "public records" elsewhere, but that nevertheless pose serious privacy problems precisely because of the increased ease of access. See *id.* at 160 (state law enforcement official, likening such compilations to a "freeway into the privacy of the individual"); *id.* at 215 (Attorney General Saxbe, stating that the "very inefficiency of [non-automated criminal history] systems was one of the chief protections of individual privacy"). Subcommittee Chairman Edwards, addressing this issue, concluded (*id.* at 222):

> [P]ublic records [are] something that any citizen can examine, like court dockets and court proceedings. The problem is that when this information is pumped into a data processing system on a nationwide basis, the rights of people can be seriously impaired.

Congress also took specific action on these concerns in 1973, by enacting a provision conditioning LEAA grants for criminal history record systems on assurances that "the security and *privacy*" of such information is maintained, and that it "shall only be used for law enforcement and criminal justice and other lawful purposes" (42 U.S.C. (& Supp. III) 3789g(b) (emphasis added)).[13] In the legislative history of that provision, Congress referred to "the unsettled and sensitive issues of the right of privacy and other individual rights affecting the maintenance and dissemina-

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[12] Contrary to the court of appeals' implications, the fact that these hearings did not lead to more comprehensive changes in laws regarding criminal history records systems does not mean that Congress rejected "the federal policy that [petitioners] now urge" (Pet. App. 42a, 23a n.15). The bills under consideration dealt with a broad range of issues regarding criminal history records, such as the accuracy and completeness of such records, provisions for the subject's right to inspect them, and specific limits on the use of arrest records (see *House Criminal Justice Hearings* 2-75). Moreover, insofar as they addressed the dissemination of such records, these hearings and the draft legislation under consideration focused not on "public" access to them, but on the selective and sometimes improper access gained by employers, credit bureaus, and other entities in ways that had nothing to do with FOIA (*id.* at 135-136, 161, 187, 213). The lack of any attention to FOIA at such hearings is easily explained, moreover, by the fact that at that time such records were undoubtedly assumed to be exempt from its coverage, either by virtue of Exemption 7, which exempted nearly all law enforcement files (see *FBI* v. *Abramson,* 456 U.S. at 627), or by Exemption 3, as triggered by 28 U.S.C. 534, which had been recently interpreted as restricting dissemination of such records (see note 11, *supra*). The true relevance of these hearings does not lie in the fact that the specific legislation under consideration was not passed, but in the light they shed on the congressional understanding of the term "privacy" at this time.

[13] Indeed, as noted by Judge Starr in dissent below, a "host of state laws" protect the very sort of criminal history compilations at issue here from disclosure (Pet. App. 44a). Such state laws are based on the realization that compilations of criminal history records into readily accessible form pose significant "privacy" concerns even though the individual entries may be "public" at their original sources. See generally R. Smith, *Compilation of State and Federal Privacy Laws at* v, 3-4 (1984-1985 ed.); Lautsch, *Digest and Analysis of State Legislation Relating to Computer Technology,* 20 Jurimetrics J. 201, 210-211 (1980).

tion of criminal justice information." S. Conf. Rep. 93-349, 93d Cong., 1st Sess. 7-8, 32 (1973).

c. These developments of the early 1970s shed important light on the common and congressional understanding of the term "privacy" at that time and are thus highly relevant to the interpretation of the privacy provision at issue here—Exemption 7(C), which was added to FOIA in 1974. See *St. Paul Fire & Marine Insurance Co.* v. *Barry*, 438 U.S. 531, 541, 545 (1978) (interpreting the term "boycott" in light of a "tradition of meaning," including "the customary understanding * * * at the time of enactment"). Exemption 7(C), modeled on Exemption 6 but expressly affording greater leeway for withholding by referring to "unwarranted" rather than "clearly unwarranted" invasions of personal privacy,[14] was part of an overall restructuring of Exemption 7, in which the broad exemption of law enforcement records was replaced by several more closely tailored exemptions for particular types of law enforcement records. See generally *FBI* v. *Abramson*, 456 U.S. at 621-622. The history of Exemption 7(C) as such is extremely sparse (see *id.* at 634 (O'Connor, J., dissenting)), because the entire amendment to Exemption 7 was offered as a floor amendment. See 120 Cong. Rec. 17033-17041 (1974), *FOIA Source Book II* 332-352. In addition to the background discussed above, however, the history of the Privacy Act of 1974 (5 U.S.C. 552a) reflects

[14] This alteration was a deliberate broadening of the privacy protection in the law enforcement area, in response to criticisms of the proposed legislation by President Ford. H.R. Conf. Rep. 93-1380, 93d Cong., 2d Sess. 12 (1974), *reprinted in* Senate Comm. on the Judiciary, 94th Cong., 1st Sess., *Freedom of Information Act and Amendments of 1974 (P.L. 93-502) Source Book: Legislative History, Texts, and Other Documents* 219, 229 (1975) [hereinafter *FOIA Source Book II*]; 120 Cong. Rec. 33158-33159 (1974), *FOIA Source Book II*, at 368-372.

clearly the scope of Congress's understanding of the term "privacy" at that time. Because these two enactments were under consideration during the same period of time[15] and were intended to complement each other,[16] the history of the Privacy Act is also relevant to the meaning of the term "privacy" as used contemporaneously in Exemption 7(C). Cf. *United States* v. *Stewart*, 311 U.S. 60, 64-65 (1940).

As Judge Starr noted in his dissent below, the Privacy Act's history reflects clear congressional concern with the privacy implications of large data banks. See Pet. App. 44a (citing H.R. Rep. 93-1416, 93d Cong., 2d Sess. 3, 6-9 (1974), *Privacy Act Source Book* 296, 299-302).[17] Moreover, a major impetus to the passage of the Privacy Act was the realization that, while government had long collected substantial amounts of information concerning individuals, new means of expanding access and easing retrieval of such information posed a distinct and far greater threat to personal privacy. See 120 Cong. Rec. 12646-12647 (1974), *Privacy Act Source Book* 4-6 (remarks of Sen. Ervin); S. Rep. 93-1183, 93d Cong., 2d Sess. 9-10 (1974), *Privacy Act Source Book* 154, 162-163 (remarks of Sen. Goldwater, noting privacy implications of computerized government data banks arising from the

[15] Consideration of both measures took place during overlapping periods of 1974. Indeed, Congress gave final approval to the Privacy Act on the same day it overrode President Ford's veto of the FOIA amendments. See Senate Comm. on Government Operations, 94th Cong., 2d Sess., *Legislative History of the Privacy Act of 1974, Source Book on Privacy* 1182 (1976) [hereinafter *Privacy Act Source Book*].

[16] See 121 Cong. Rec. 32888 (1975), *Privacy Act Source Book* 1173 (remarks of Sen. Kennedy).

[17] Indeed, the committee hearings included specific focus on the special privacy concerns raised by "interlocking relationships * * * between Federal and local data handlers in the enforcement field." S. Rep. 93-1183, *supra*, at 18, *Privacy Act Source Book* 171.

ability of such systems to centralize and make readily retrievable information that would otherwise be inaccessible because of limitations of time and distance). Thus, at the time that Congress was contemplating the "privacy" language of Exemption 7(C), it understood that term as encompassing the unique and important concerns raised by large government compilations of scattered personal records.[18]

In sum, the full legislative background of the FOIA privacy exemptions, and the broad nature of "privacy" as a general principle of law, support the proposition that the subject of a compiled "rap sheet" may indeed have a strong "privacy" interest in the withholding of that document, even if the raw data on which it was based are matters of public record if one knows where to look.

B. Assessment Of The Privacy Interest In Nondisclosure Requires A Practical Evaluation Of All Relevant Factors

Once the proper range of "privacy" interests under the statute is understood, the assessment of the privacy side of the balancing test becomes a straightforward exercise in common sense and judgment. As the previous pronouncements of this Court make clear, such an assessment must be governed by a sensible evaluation of all relevant circumstances rather than a mechanical application of bright-line rules either favoring or barring disclosure. The analysis of the court of appeals ignores these important

[18] This conclusion is further supported by the provisions of the Privacy Act, which include, among other things, a provision specifically permitting the exemption of criminal history records from most of the rights granted by the Act, including the right of access to such records by the subject himself (5 U.S.C. 552a(j)(2)(A)). Such a provision would have had little point if Congress had shared the court of appeals' view of FOIA, under which most criminal history records would be freely available to anyone, including, of course, the subject.

lessons, and, as the dissent below noted, collapses the entire analysis into a "deference-driven, single-factor test" (Pet. App. 48a).

1. In *Department of the Air Force* v. *Rose, supra,* this Court addessed for the first time the nature of the balancing test to be applied under Exemption 6. The Court first rejected a per se rule proffered by the government—*i.e.*, that the "clearly unwarranted invasion" language of Exemption 6 modified only "similar files," and hence that *all* "personnel" and "medical" files were exempt (425 U.S. at 370-376). Despite the grammatical ambiguity that made such a reading plausible, the Court rejected such a "blanket exemption," in an extensive review of the legislative history that emphasized the "general" nature of the exemption and Congress's consistent preference for case-by-case balancing in this area instead of per se rules (425 U.S. at 372-373).

In conducting such balancing, moreover, the Court indicated that the assessment of the privacy interests at stake should take into account practical considerations such as the likelihood that persons with prior access to the information may not have realized its significance or may have forgotten what they once knew (see 425 U.S. at 380-381; see also *id.* at 389 (Blackmun, J., dissenting)). As the court of appeals decision affirmed in *Rose* explained, "a person's privacy may be as effectively infringed by reviving dormant memories as by imparting new information" (*Rose* v. *Department of the Air Force,* 495 F.2d 261, 267 (2d Cir. 1974)). The approach of the court of appeals in the present case—which treats all "public records" as equally devoid of privacy implications, regardless of how obscure or difficult to obtain they are as a practical matter—is at odds with this pragmatic approach to assessing the "privacy" interest that an individual justifiably has in information regarding past charges of misconduct that,

although available at some time or at some location, is not now in fact widely known or easily discoverable.

In *United States Dep't of State* v. *Washington Post Co.*, *supra,* this Court rejected an attempt by the court of appeals to substitute a mechanical, per se rule for the careful balancing of interests required by the FOIA privacy exemptions. The Court reversed a ruling that the "similar files" subject to Exemption 6 are limited to files reflecting "intimate details," holding instead that the exemption applies broadly to information " 'the disclosure of which might harm the individual,' " and that it is "the balancing of private against public interests, not the nature of the files in which the information was contained, [that] should limit the scope of the exemption." 456 U.S. at 599 (quoting H.R. Rep. 1497, *supra,* at 11, *FOIA Source Book* 32). In the same vein, the Court observed that even data that are "not normally regarded as highly personal"—in particular, such mundane matters as "place of birth, date of birth, date of marriage, [and] employment history"—"would be exempt from any disclosure that would constitute a clearly unwarranted invasion of personal privacy" (456 U.S. at 600). That observation is difficult if not impossible to reconcile with the view taken below that there is, of necessity, only a "low-level privacy interest" in any records that happen to be "public[ly] availab[le] somewhere in the nation" (Pet. App. 19a-20a).

This Court in *Washington Post* also commented specifically on the matter of requests for "public records." In remanding that case (which involved a request for information regarding whether certain individuals held United States passports), the Court stated that, in the weighing of interests to be conducted, "the fact that citizenship is a matter of public record somewhere in the Nation *cannot be decisive*" (456 U.S. at 603 n.5 (emphasis added)). Although the Court indicated that the "public

nature of the information" *may* support disclosure in a given case, it can do so only as part of a consideration of "*all* the circumstances" of such a case (*ibid.* (emphasis added)).[19] The court of appeals' analysis in the present case—which *does,* as a practical matter, treat the "public record" status of arrest and conviction records as "decisive"—contradicts that admonition.[20]

2. When the teachings of these cases are applied to the situation at hand, a number of common-sense factors emerge as relevant to the strength of the privacy interests at stake. A starting point is the inherently derogatory nature of an arrest record, which, in addition to affecting an individual's reputation as such, may inflict substantial harm by restricting his opportunities for employment, education, housing, and financial services (see J.A. 81-82,

[19] The Court gave "past criminal convictions" as a specific example of the kind of record whose "public nature" could not be decisive but might be a reason to release the record after considering "all the circumstances of a given case" (456 U.S. at 603 n.5).

[20] Respondents have emphasized (Br. in Opp. 11) the court of appeals' *only* qualification to its per se rule—its statement that a significant privacy interest *might* be created by a showing of "particular harm" to the subject of the record (Pet. App. 40a). This grudging departure from an otherwise blanket rule is a far cry from the balanced consideration of "all the circumstancess of a given case" contemplated by this Court. Moreover, the court's requirement of particularized harm is directly contrary to the words of the statute, which exempt law enforcement records the disclosure of which "*could reasonably be expected* to constitute an unwarranted invasion of personal privacy" (5 U.S.C. (Supp. IV) 552(b)(7)(C) (emphasis added)). Finally, by acknowledging a privacy interest *only* when such concrete harm is shown, the court of appeals ignored most of the interests encompassed by the term "privacy," which, as discussed above, pertains principally to the intangible yet important interest of individuals in controlling the dissemination of information about themselves. See *Miller* v. *Bell,* 661 F.2d 623, 629-630 (7th Cir. 1981), cert. denied, 456 U.S. 960 (1982).

74-75; *House Criminal Justice Hearings* 76, 109, 122-125; *Menard* v. *Mitchell*, 430 F.2d at 490; D. Marchand, *The Politics of Privacy, Computers, and Criminal Justice Records* 96-100 (1980)).[21] The strength of this factor will of course vary according to the character of the particular crimes at issue, but this potential for harm is a privacy interest that must always be considered in the Exemption 6 or 7(C) balance. See *Washington Post*, 456 U.S. at 599 (quoting H.R. Rep. 1497, *supra*, at 11, *FOIA Source Book* 32).

Similarly, the age, location, and character of any charges involved in a particular criminal history record will have a bearing on the strength of the privacy interest. For example, if an arrest took place in the distant past, if it did not then attract great notoriety, and if it occurred in an area distant from where the subject now lives, the subject will have an especially strong interest in protecting such information from release to any person who might request it. See *Rose*, 425 U.S. at 389 (Blackmun, J., dissenting) ("It is sad to see * * * individuals placed in jeopardy and embarrassment for lesser incidents long past.").[22]

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[21] One problem discussed in the cited hearings was that those adverse effects are suffered disproportionately by racial minorities. *House Criminal Justice Hearings* 106, 111-112; see also D. Marchand, *supra*, at 106-107.

[22] The five Justices in the majority in *Rose* did not fail to recognize the substantial privacy interest that generally inheres in information about past misconduct or allegations of misconduct. They felt, however, that the redaction of identifying information generally sufficed to protect that interest and that instances in which redaction was not sufficient could be handled on a case-by-case basis rather than through a general denial of access (see 425 U.S. at 380-381). Here, of course, respondents propose no steps to prevent identification of the individual. They obviously could not do so, since they claim the right to obtain the arrest records of named individuals so long as the underlying data are "public" somewhere.

An additional factor that affects the weight of the privacy interest is the character of a particular rap sheet entry—*e.g.*, whether it reflects a criminal conviction, or merely an arrest. Although both sorts of records may prove harmful to the subject, much of the attention that has been given to the privacy ramifications of criminal history records has focused on bare arrest records, which, although they are obviously less reliable indicators of a person's character, may have the same adverse consequences as conviction records.[23] The uncertainty and potential unfairness surrounding arrest records is exacerbated in the case of rap sheets, since the FBI has no reliable way of knowing, without burdensome additional investigation on its part, whether a given "arrest" entry resulted in a conviction, an acquittal, or even dismissal of charges based on a finding of lack of probable cause.[24]

Consideration of those factors—and any others that present themselves in particular cases—will ensure that the important practical concerns that individuals have regarding their criminal history records will be given the consideration Congress intended. If, on the other hand, the

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[23] See *1971 Hearings* 858-860 (remarks of Sen. Ervin); *House Criminal Justice Hearings* 76, 109; D. Marchand, *supra*, at 101-102.

[24] See *Menard* v. *Mitchell*, 328 F. Supp. at 723-724. A related problem facing the FBI with respect to conviction records is that it generally has no way of knowing—without resort to additional investigation—whether a particular conviction record has been expunged at the original source. Although the FBI and the law enforcement entities that contribute rap sheet data make substantial efforts to prevent the preservation in FBI records of information expunged at the local level, inevitable imperfections magnify the privacy concerns surrounding dissemination of rap sheet information.

court of appeals' approach of equating "privacy" with official secrecy at every level of government were adopted, the lives of millions of persons would become a good deal less private.

C. The Court Of Appeals' Test Improperly Requires The FBI, In Responding To Individual FOIA Requests, To Investigate The Disclosure Practices Of Other Governmental Entities

In addition to the errors already noted, the court of appeals imposed on the FBI the task of ascertaining whether the requested information is available as a "public record" in some other, nonfederal government office, a fact on which the court's privacy analysis turns, but which is often not known to an agency when a FOIA request is made. In so doing, the court imposed administrative burdens not contemplated by FOIA and ignored the pertinent statutory standard regarding disclosures that "could reasonably be expected to constitute an unwarranted invasion of personal privacy" (5 U.S.C. (Supp. IV) 552(b)(7)(C)).

1. When it receives a FOIA request for rap sheet information, the FBI generally will not be certain, without further inquiry, whether any particular arrest entry on a rap sheet is reflected in local "public records." Even if the state agency that submitted an arrest record considers such information confidential, for example, the information may still be "public" at its original source. And, as noted above, the FBI would have no way of knowing, without a specific inquiry at the time of the FOIA request, whether an arrest or conviction has been expunged from the public record. The test imposed by the court of appeals, however, would *require* the FBI (and the court reviewing de novo) to determine, as a condition of nondisclosure (Pet. App. 42a), "as a matter of fact, not law, whether, by reason of the actual practices of the jurisdiction that is the original

source, the subject's privacy interest has faded."[25] As the dissent below recognized, the administrative burden that this aspect of the majority's opinion would impose would be "substantial (if indeed not crippling)" (Pet. App. 46a).

A requirement that agencies ascertain, at the time of each FOIA request, the status of particular information under local law imposes a new and distinct obligation on agencies in responding to FOIA requests, which is to be found nowhere in FOIA itself. See generally *NLRB* v. *Sears, Roebuck & Co.*, 421 U.S. 132, 161-162 (1975) (condemning court-imposed requirement that agencies generate new records in order to respond to FOIA requests); see also *Kissinger* v. *Reporters Committee for Freedom of the Press*, 445 U.S. 136, 159-160 n.2 (1980) (Brennan, J., concurring in part and dissenting in part) ("FOIA [does not] compel[] the Government to conduct research on behalf of private citizens"). The court of appeals' analysis, however, affords an agency no other way of protecting even the conceded privacy interest in information that is secret at all levels of government. The court suggested that the FBI might fulfill its obligation by referring the requester to the providing agency (Pet. App. 26a). Such a response, however, would tell the requester that the subject "has an arrest record"—incomplete yet damaging information that may be all the requester cares to know.

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[25] A subsequent decision of the court of appeals confirms that its approach to privacy interests under Exemptions 6 and 7(C) will make it essential for agencies to ascertain the "public record" status of requested information. In *Ostrer* v. *FBI*, 836 F.2d 1408 (D.C. Cir. 1988) (Table), a case involving FBI rap sheets, the court in its unpublished opinion remanded for further consideration in light of the present case, stating, "[i]n order to evaluate the privacy interest, we need to know whether the information in the 'rap sheets' has been placed in the public domain by any local, state, or federal agency" (slip op. 9).

Nor is it any answer to say, as respondents do (Br. in Opp. 13 n.4), that the government may avoid this burden by exercising discretion to release such information even if it qualifies for withholding under FOIA. Unless disclosure of such information is *required* by FOIA, it is *prohibited* by the Privacy Act (5 U.S.C. 552a(b)(2)). Thus, the court of appeals' approach would indeed compel the FBI, as well as other federal agencies in possession of such data compiled from other "public" sources, to determine how other governmental entities have treated particular information.

2. Apart from its imposition of an unmanageable standard involving burdens not envisioned by Congress, the court of appeals' insistence that agencies ascertain the local "public record" status of information violates FOIA principles by demanding a level of certainty in these matters that Congress never intended. From the earliest consideration of the FOIA privacy exemptions, Congress recognized that the privacy implications of particular information would not always be clearcut. It therefore provided for the withholding of "files the disclosure of which *might harm* the individual." H.R. Rep. 1497, *supra*, at 11, *FOIA Source Book* 32 (emphasis added); see *Washington Post*, 456 U.S. at 599.

Congress's desire to guard against the substantial possibility and not just the certainty of individual harm is especially clear in the context of law enforcement records. In 1986, Congress amended Exemption 7(C), so that it now expressly exempts records the disclosure of which "*could reasonably be expected to* constitute an unwarranted invasion of personal privacy" (new language emphasized). This change was made "with the avowed purpose of '* * * eas[ing] considerably a Federal law enforcement agency's burden in invoking [the exemption].' " See *Irons* v. *FBI*, 811 F.2d 681, 687 (1st Cir. 1987) (quoting 132 Cong. Rec. S16504 (daily ed. Oct. 15, 1986)).

Application of this "reasonably expected" language, together with a proper understanding of the term "privacy" as discussed above, shows that the unworkable scheme envisioned by the court of appeals is entirely unnecessary. When the FBI receives a FOIA request for a rap sheet, it knows without any further investigation that a given entry may well be a matter of public record "somewhere in the nation," but that it is also quite likely that the record is freely available if at all only from the local agency (*e.g.*, county court or local police department) from which it originated. This information, together with the practical considerations noted above (date, location, character of offense, and type of entry), provides an ample basis on which the agency can base a pragmatic assessment of the degree to which release "could reasonably be expected to constitute an unwarranted invasion of personal privacy."

II. THE BALANCING TEST UNDER EXEMPTIONS 6 AND 7(C) REQUIRES AN ASSESSMENT OF THE PUBLIC INTEREST IN THE DISCLOSURE OF PARTICULAR INFORMATION, GUIDED BY THE BASIC POLICIES OF FOIA

The court of appeals made an even more radical departure from settled law when it turned to the "public interest" side of the balancing test. Rather than engaging in the straightforward weighing of competing interests that the statute calls for, the court asserted that it "cannot" make any assessment of the particular public interest in the disclosure of any specific information (Pet. App. 38a). That unprecedented approach to balancing under Exemptions 6 and 7(C)—which even respondents do not defend (Br. in Opp. 5, 18)—fails to effect the judicious balancing of interests called for by Congress, ignores the nature of the interests to be balanced, and—as recognized by the

two judges who have actually considered the competing interests on the facts of the present case—would lead to an incorrect result here.

A. A Refusal To Consider The "Public Interest" In The Release Of Particular Information Would Preclude A Meaningful Balancing Of Interests And Lead To Illogical Results

As this Court has repeatedly recognized, the use of the word "unwarranted" in the FOIA privacy exemptions requires " 'a balancing' of the private and public interests." *Rose,* 425 U.S. at 373; see *Washington Post,* 456 U.S. at 599. That conclusion derives directly from the legislative history of Exemption 6, which calls for such a balancing in clear terms (S. Rep. 813, *supra,* at 9, *FOIA Source Book* 44):

> The phrase "clearly unwarranted invasion of personal privacy" enunciates a policy that will involve a balancing of interests between the protection of an individual's private affairs from unnecessary public scrutiny, and the preservation of the public's right to governmental information.

Although this Court has not previously had occasion to elaborate on the manner in which courts are to assess the weight given to "the public's right to governmental information" in this balance, such assessments have routinely focused on the "public interest" in the release of the particular information sought, with the result often turning on whether the court has believed that interest to be substantial or slight.[26]

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[26] See, e.g., *Columbia Packing Co.* v. *United States Dep't of Agriculture,* 563 F.2d 495, 499 (1st Cir. 1977); *Aronson* v. *United States Dep't of HUD,* 822 F.2d 182, 185-186 (1st Cir. 1987); *Committee on Masonic Homes* v. *NLRB,* 556 F.2d 214, 220-221 (3d Cir. 1977); *Core* v. *United States Postal Service,* 730 F.2d 946, 948-949 (4th Cir. 1984); *Heights Community Congress* v. *Veterans Administration,* 732 F.2d 526, 529-530 (6th Cir.), cert. denied, 469 U.S. 1034 (1984); *Minnis* v. *United States Dep't of Agriculture,* 737 F.2d 784, 786-787 (9th Cir. 1984), cert. denied, 471 U.S. 1053 (1985); *Campbell* v. *United States Civil Service Comm'n,* 539 F.2d 58, 62 (10th Cir. 1976); *Cochran* v. *United States,* 770 F.2d 949, 956 (11th Cir. 1985); *Senate of Puerto Rico* v. *United States Dep't of Justice,* 823 F.2d 574, 588 (D.C. Cir. 1987); see also *Arieff* v. *United States Dep't of the Navy,* 712 F.2d 1462, 1468 (D.C. Cir. 1983) (noting that asserted public interests in disclosure fell within FOIA's "core purpose"); Pet. App. 37a (recognzing that "[p]rior cases of this circuit have purported to appraise and value the public interest in specific information sought").

The court of appeals rejected that approach to public interest assessments under FOIA, stating that it found such assessments "awkward[]" and doubted its authority to make such "idiosyncratic determinations" on a case-by-case basis (Pet. App. 23a). Instead, the court concluded that "the phrase 'public interest,' as used in the balancing in Exemptions 6 and 7(C) of the Act, means [nothing] more or less than the general disclosure policies of the statute" (*id.* at 39a). Holding that the public interest in particular disclosures cannot be "judged at all" (*ibid.*), the court posited a purely static "public interest" in the release of *any* information in the government's possession, which could be "balanced" against any particular harm to the subject of the information (*id.* at 40a).

That altogther novel approach (see Pet. App. 48a (Starr, J., dissenting)) would lead to illogical practical consequences far more troubling than the "idiosyncratic" determinations the court of appeals feared. Under that analysis, a court would be *incapable* of distinguishing between a FOIA request for personal information about "one's otherwise inconspicuously anonymous next-door neighbor" and one concerning "a public figure or an official holding high government office" (*id.* at 45a).

Depending on the assessment of the privacy interest at stake, that approach will lead to either gross over-disclosure or significant overwithholding. In the present case, the court of appeals' refusal to acknowledge the *lack* of any significant public interest in the release of most arrest records led it to adopt "a virtual per se rule" potentially affecting the privacy of millions of persons (Pet. App. 48a (Starr, J., dissenting)). If, on the other hand, it were determined that a particular class of records generally *did* pose privacy concerns outweighing the general FOIA policy of disclosure, agencies and courts would be powerless to make exceptions even if, in a particular instance, such records reflected large-scale fraud in government operations or the mental incapacity of public officials.[27] Such a mechanistic approach is the antithesis of the case-by-case balancing of interests envisioned by Congress.

The court of appeals was simply wrong in supposing that the balancing of a "public interest" in the disclosure of information against a potential invasion of privacy is a task beyond the capability of the judiciary.[28] This Court

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[27] As noted above, the Privacy Act generally prohibits the release of information regarding individuals unless disclosure in required by FOIA.

[28] The court's concern about the awkwardness of such judicial appraisals was recognized – and answered – almost a century ago (Warren & Brandeis, *The Right of Privacy*, 4 Harv. L. Rev. 193, 214 (1890) (footnote omitted)):

> The right to privacy does not prohibit any publication which is of public or general interest.
>
> In determining the scope of this rule, aid would be afforded by the analogy, in the law of libel and slander, of cases which deal with the qualified privilege of comment and criticism on matters of public and general interest. There are of course difficulties in applying such a rule; but they are inherent in the subject-matter, and are certainly no greater than those which exist in many other branches of the law, – for instance, in that large class of cases in which the reasonableness or unreasonableness of an act is made the test of liability.

Cf. Pet. App. 45a-46a (Starr, J., dissenting).

has required determinations of whether particular information is of "public concern" for purposes of applying the First Amendment[29] and has called for the balancing of public and private interests in determining whether grand jury transcripts should be released.[30] Indeed, consideration of the "public interest" in the disclosure of particular information is a well-established criterion in other areas of FOIA law. For example, Congress has expressly made that "public interest" the principal standard for the waiver of search and duplication fees (5 U.S.C. (Supp. IV) 552(a)(4)(A)(iii)). Moreover, as the courts have uniformly recognized, the legislative history of the FOIA attorneys' fees provision (5 U.S.C. 552(a)(4)(E)) makes the "benefit to the public deriving from the case" one of the "central guidelines" in making the discretionary determination whether to award such fees to prevailing plaintiffs.[31] Thus, the notion that courts "cannot" measure the public interest in disclosure of particular information (Pet. App.

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[29] See *Dun & Bradstreet* v. *Greenmoss Builders*, 472 U.S. 749, 757-761 (1985) (plurality opinion); *Connick* v. *Myers*, 461 U.S. 138, 143 & n.5 (1983); *Rankin* v. *McPherson*, No. 85-2068 (June 24, 1987), slip op. 6.

[30] See *Douglas Oil Co.* v. *Petrol Stops Northwest*, 441 U.S. 211, 223 (1979).

[31] *Blue* v. *Bureau of Prisons*, 570 F.2d 529, 533 (5th Cir. 1978) (citing S. Conf. Rep. 93-1200, 93d Cong., 2d Sess. 9 (1974); see *Fenster* v. *Brown*, 617 F.2d 740, 742-744 (D.C. Cir. 1979) (same).

38a) is a marked departure from traditional jurisprudence, both generally and under FOIA itself.[32]

More fundamentally, the court of appeals erred in supposing that the difficulty or "awkwardness" of assessing the public interest in the release of particular information gave it license to ignore Congress's instruction to engage in meaningful balancing. In enacting Exemption 6, Congress squarely addressed that consideration, concluding that "[i]t is not an easy task to balance the opposing interests, but it is not an impossible one either." S. Rep. 813, *supra,* at 3, *FOIA Source Book* 38 (quoted in *Rose,* 425 U.S. at 373 n.9). As the dissenting judge below pointed out, "the federal courts are duty-bound, for better or worse, to perform the task Congress has assigned [them]" (Pet. App. 34a).

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[32] The court of appeals went particularly far astray when it claimed (Pet. App. 39a n.3; cf. *id.* at 25a & n.18, 38a-39a & n.2) that its novel analysis was supported by *FBI* v. *Abramson,* 456 U.S. 615 (1982). Although this Court did state in *Abramson* that "Congress • • • did not invite a judicial weighing of the benefits and evils of disclosure on a case-by-case basis" (456 U.S. at 631 (footnote omitted)) the Court certainly did not mean to disparage case-by-case balancing in the interpretation of the phrase "unwarranted invasion of personal privacy" in Exemptions 6 and 7(C). Rather, as Judge Starr pointed out (Pet. App. 32a-34a), the Court made the quoted statement *after* observing (456 U.S. at 623) that it was undisputed there that the requested disclosure would be an unwarranted invasion of privacy. The Court found case-by-case balancing to be inappropriate in determining whether the requested records were "compiled for law enforcement purposes" (5 U.S.C. (& Supp. IV) 552(b)(7)), not in determining whether their disclosure constituted an "unwarranted" invasion of privacy. Indeed, it was just one week before deciding *Abramson* that the Court emphasized – in a unanimous decision – the vital importance of judicial balancing to proper application of FOIA's privacy exemptions. *United States Dep't of State* v. *Washington Post Co.,* *supra.*

B. The Public Interest In Disclosure Should Be Assessed With Reference To FOIA's Core Purposes

The case-by-case, de novo balancing mandated by Congress need not be the sort of standardless, "idiosyncratic" inquiry that the court of appeals feared. The policies of FOIA itself, as recognized by this Court, provide a structured means of assessing the weight of the "public interest" in a given case. In *Rose,* this Court stated that, in Exemption 6, "Congress sought to construct an exemption that would require a balancing of the individual's right of privacy *against the preservation of the basic purpose of the Freedom of Information Act 'to open agency action to the light of public scrutiny'* " (425 U.S. at 372 (quoting court of appeals opinion, 495 F.2d at 263) (emphasis added)). As the Court has elaborated elsewhere, the "basic purpose" of FOIA is "to ensure an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption and to hold the governors accountable to the governed." *NLRB* v. *Robbins Tire & Rubber Co.,* 437 U.S. 214, 242 (1978). The degree to which these core purposes of FOIA may be furthered by a given disclosure, weighed against the degree to which disclosure would invade the subject's privacy interests, provides a sensible and statutorily based means of determining whether the invasion of privacy is "warranted" by "the public's right to governmental information." See S. Rep. 813, *supra,* at 3, *FOIA Source Book* 38.

Even though such a "core purposes" test is supported by the above-quoted language in *Rose,* and has been employed by a number of other courts in performing the required balancing,[33] the court of appeals below rejected

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[33] See *Columbia Packing Co.* v. *United States Dep't of Agriculture,* 563 F.2d at 499; *Committee on Masonic Homes* v. *NLRB,* 556 F.2d at 220; *Minnis* v. *United States Dep't of Agriculture,* 737 F.2d at 787;

it, arguing that it should be left to "the citizenry" to assess the pertinence of any particular information to its need to be informed (Pet. App. 38a). Such reasoning reflects, of course, the *general* approach of FOIA. Congress believed that a policy of free disclosure would best serve democratic interests, and it sought, for the most part, to avoid broad inquiries such as whether a requester was "properly and directly concerned," or whether there was "good cause" for withholding. See H.R. Rep. 1497, *supra*, at 5-6, *FOIA Source Book* 26-27 (citing standards from existing law regarding "public information," 5 U.S.C. (1964 ed.) 1002). When privacy interests are implicated, however, Congress provided express exemptions to that general approach, which explicitly *do* call on agencies—and the courts, reviewing agency determinations de novo (5 U.S.C. 552(a)(4)(B))—to determine whether disclosures are "warranted." Given Congress's special concern for privacy interests,[34] it should hardly be surprising that the protection of such interests calls for a test unlike those for application of other, categorical FOIA exemptions.

Congress has recently given even more concrete expression to its understanding of the "public interest" in the context of FOIA. In addition to modifying Exemption 7 as

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Cochran v. *United States*, 770 F.2d at 956; see also Comment, *The Freedom of Information Act's Privacy Exemption and the Privacy Act of 1974*, 11 Harv. C.R.-C.L. L. Rev. 596, 606-610 (1976) (proposing such a test). Indeed, respondents in the present case appear not to take issue with the propriety of this test (Br. in Opp. 16-18).

[34] As noted above, the legislative history reflects an assessment of privacy rights as "equally important" and deserving "equal attention" as the public's right to information. See S. Rep. 813, *supra*, at 3, *FOIA Source Book* 38; *1963 Hearings* 50 (remarks of Sen. Bayh, proposing inclusion of a privacy exemption).

discussed above, the 1986 FOIA amendments restructured the statutory provisions regarding search and duplication fees, and the waiver of those fees in certain instances. Pub. L. No. 99-570, § 1803, 100 Stat. 3207-49 to 3207-50 (amending 5 U.S.C. 552(a)(4)(A)). In the fee waiver provision—which had always been geared to a showing of the "public benefit" of particular FOIA disclosures—the 1986 amendments elaborate on that concept, specifying that fees should be waived or reduced "if disclosure of the information is in the public interest *because it is likely to contribute significantly to public understanding of the operations or activities of the government*" (5 U.S.C. (Supp. IV) 552(a)(4)(A)(iii) (emphasis added)). The legislative history of that provision indicates Congress's belief that it reflects the preexisting "public interest" standard, and that this standard is capable of "objective[] evaluat[ion]" (132 Cong. Rec. H9464 (daily ed. Oct. 8, 1986) (explanatory materials introduced by Rep. English)).

As the dissent below recognized, "there *is* meaning in the public-interest standard" (Pet. App. 45a). Congress has called on the courts to assess the public interest in the disclosure of particular information and has implicitly provided the criterion by which they may do so.[35] The court of appeals erred in refusing to undertake that task.

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[35] That a court should evaluate the public interest in the disclosure of *particular information* does not mean, of course, that the anlaysis should turn on the nature or purpose of a *particular request*. We agree with the court below that FOIA's command that nonexempt records be made available "to any person" (5 U.S.C. 552(a)(3)), and the lack of any mechanism in FOIA for limiting the dissemination of information once the government has given it out, preclude distinctions among various requesters or among uses to which the information will be put. See Pet. App. 23a-24a, 38a-39a & n.2; *NLRB* v. *Sears*,

III. THE AGENCY AND THE DISTRICT COURT PROPERLY DETERMINED THAT THE BALANCE OF PUBLIC AND PRIVATE INTERESTS IN THIS CASE SUPPORTS WITHHOLDING OF THE REQUESTED RECORDS

In the present case, both the Department of Justice and the district court, reviewing de novo, concluded that there was no information concerning Charles Medico in the pertinent files whose release was warranted in the public interest (J.A. 109, 117; Pet. App. 57a). The only judge of the court of appeals panel who purported to engage in an actual balancing of interests agreed with that conclusion and voted to affirm the judgment in the government's favor (Pet. App. 49a). The agency and those judges correctly assessed the competing interests in this case.

When a FOIA request for specific criminal history records is made, there are, as Judge Starr noted below, two factors that are "powerfully relevant" to determining the extent of any public interest in their release—*i.e.*, the nature and age of any offenses recorded (Pet. App. 31a). Taken together with any information about the ways, if any, in which the subject is involved with "the operation or activities of the government" (see 5 U.S.C. (Supp. IV) 552(a)(4)(A)(iii)), those factors provide the agency and a reviewing court with an ample basis on which to determine whether release of the information "could reasonably be expected to constitute an unwarranted invasion of personal privacy."

Roebuck & Co., 421 U.S. 132, 143 n.10, 149 (1975); *Washington Post Co. v. Department of HHS*, 690 F.2d 252, 258 & n.17 (D.C. Cir. 1982); *Ditlow v. Shultz*, 517 F.2d 166, 172 n.21 (D.C. Cir. 1975). This proposition is simply irrelevant, however, to the question whether the courts are capable of assessing "the interest of the general public in release of the records themselves" (Pet. App. 26a).

Although the court of appeals majority maintained that "the government is utterly incapable of explaining to us why the information sought here does not serve the Act's 'core' policy" (Pet. App. 38a), we respectfully disagree. Public disclosure of the criminal records (if any) of Charles Medico would not serve FOIA's core policies because Mr. Medico is not himself a public official, and, although he is alleged to have had dealings with a former public official, no "financial crime" records that arguably might bear on that official's discharge of his public duties exist.[36] In the absence of any other alleged connection of Charles Medico to the functioning of government, it seems quite plain that nothing in his criminal record (if any) would aid an informed citizenry in the exercise of democratic political choices. That was certainly the conclusion drawn by the district court and by Judge Starr,

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[36] In April 1983, when the government formally disclosed that no "financial crime" records existed in other than rap sheet form, the government neither confirmed nor denied that Charles Medico had a rap sheet containing financial crime information because the government was still maintaining that all rap sheet information was exempt under FOIA Exemption 3, as triggered by 28 U.S.C. 534 (see J.A. 105-106 n.3). Now that the court of appeals has rejected our Exemption 3 argument and we have not sought review on that issue in this Court, we are authorized to disclose that Charles Medico has no rap sheet containing financial crime information. Respondents have recently begun to speculate about other specified types of crimes (or alleged crimes) that might appear on Justice Department records concerning Charles Medico (see Br. in Opp. 17-18). We see no reason to engage in a second round of confessions that certain types of crimes would indeed be of such public interest as to warrant disclosure, accompanied by confirmations that no such records exist. Instead, we invite the Court to examine in camera the materials that we submitted to the district court. In our view, such in camera review will readily confirm that there are no records whose disclosure is supported by a public interest that outweighs Charles Medico's legitimate privacy interest.

both of whom had available to them the government's in camera submissions (see J.A. 18, 130-133), which contained any withheld criminal history information.

As often occurs in FOIA litigation, we cannot be specific in this brief (a public document) about the nature of any withheld records and the specific characteristics of those records (if any exist) that lead us to believe that Charles Medico's privacy interest outweighs any public interest in disclosure. We respectfully submit, however, that in camera examination of the records (if any), under a commonsense and practical balancing approach rather than the odd approach used by the court of appeals, admits of no other conclusion. We suggest that the Court review the in camera submission, and we submit that the Court should reverse and remand with instructions to affirm the district court's grant of summary judgment to the government.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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